

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C.

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In the Matter of)	MM Docket No. 91-58
)	
Amendment of Section 73.202(b))	RM-7419
Table of Allotments)	
FM Broadcast Stations)	RM-7797
(Caldwell, Texas, et al))	RM-7798

To: The Commission

MOTION FOR STAY

Roy E. Henderson (hereinafter "Henderson"), by his counsel herewith requests the Commission to issue a Stay of further application processing proceedings in the above captioned case until such time as a Decision on the merits of the rulemaking proceeding has been rendered by the Commission and become final. In support thereof, the following is submitted:

I. Background

The instant rulemaking case was initiated in 1989, first in Docket 88-48, and then in Docket 91-58. In 1989 Henderson first requested an upgrade of his permit for KLTR(FM) on channel 236A to 236C2 in Caldwell, Texas, and shortly thereafter a mutually exclusive request was filed by Bryan Broadcasting License Subsidiary, Inc. (hereinafter "Bryan") requesting deletion of Henderson's channel in Caldwell for use by Bryan in seeking an upgrade of KTSR(FM) in College Station, Texas.

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As noted, the original conflict was in Docket 88-48 and in resolving that Docket, Bryan agreed to, and was granted, an upgrade of its channel from 221A to 297C3. It has opted not to build that upgrade however, choosing instead to continue its efforts to remove channel 236 from Caldwell in Docket 91-58 for a further upgrade of KTSR in College Station.

II. The Prior Motion To Stay

The Commission has been amenable to Bryan's requests and during the course of the past years has issued several staff and Commission Decisions in favor of Bryan while denying Henderson's proposal. Under former rule 1.420(f) Henderson would have been protected by an automatic stay against being forced from his channel while the Commission action was on appeal but in September of 1996, the Commission repealed that rule. Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stay of Certain Allotment Orders, 11 FCC Rcd 9501 (1996). In so doing, the Commission made a point that while a stay would no longer be automatic, parties with cases on appeal could still request a stay in their particular case.

Paying particular attention to that point, the Commission in its Report and Order deleting the automatic stay rule, 11 FCC Rcd 9501 (1996), said that it would "...retain the authority ... to impose a stay in individual cases and we will be particularly cognizant of requests for stay filed by any party whose authorization would be changed involuntarily." Report and Order at paragraph 10. Henderson is such a party and Henderson filed a

Motion for Stay on September 23, 1996. The Commission took no note of that Motion for Stay for almost two years until July 22, 1998, when in acting upon Henderson's Application for Review, 13 FCC Rcd 13772 (1998), it noted its existence in a footnote and simply stated that in denying the Application for Review it was also dismissing (not denying) the Motion for Stay.

III. The Case On Appeal and Post-Remand Applications filed by Bryan

Since that time the case been appealed to the Court of Appeals by Henderson, and remand has been sought by the Commission due to the Commission's own unexplained failure to consider a major pleading then before it at the time of its last Decision and described by the Commission in its remand request as raising matters of potential "decisional significance" in this case.

The matter referred to by the Commission as being of potential "decisional significance", and of such possible decisional significance as to justify a request for remand of the case back from the court, was the matter of Bryan's demonstrated and admitted noncompliance with Section 73.315(a) of the Commission's rules. Throughout the history of this case it has been recognized that the Henderson proposal was superior in terms of area and population to be served, but also contained an alleged de minimis violation of Rule 73.315(a), while it was then believed that the Bryan proposal was in full compliance with that rule. The case was remanded back to the Commission to determine

the effect of Bryan's actual admitted substantial noncompliance
1/ with the rule upon the final determination of the case.

Within one month of the Court's remand, Bryan commenced filing applications to change its transmitter site to a new one compliant with rule 73.315(a), and has since filed for yet further site changes (it is now on its fourth proposed site). In its most recent Decision in this case, In Re Table of Allotments Caldwell, Texas et al, FCC 00-50, released February 15, 2000, the Commission recognized with approval the various new site changes proposed by Bryan, and again found in favor of Bryan.

**IV. Subsequent Change in the Table of Allocations and
Henderson's Application For a New Fully Compliant Site.**

Subsequently, the Table of Allocations was changed due to a voluntary downgrade of radio station KRNX(FM) on its channel 236 in Victoria, Texas, ((BPH-990121IE) granted August 13, 1999) the result of which was to provide Henderson also with a new site location, one which also removed any doubt of Henderson's full compliance with rule 73.315(a). The Victoria station effected its downgrade from channel 236C1 to 236C3 as of February 1, 2000, Henderson subsequently filed for use of the newly available site on February 24, 2000, and the application was accepted for filing on March 21, 2000 (BMPH-20000321AAO), Public Notice 24703.

1/ Henderson was alleged to miss 4% area including 25 persons;
Bryan admitted missing 8.4% area including 4,158 persons

**V. The Effect of The Pending Applications
And The Need For a Stay**

At this point both Bryan and Henderson have applications on file to move their sites for operation on channel 236. Determination of which should ultimately be fully considered and granted should logically await a final determination of which proposal should be granted, i.e. should Henderson be allowed to upgrade channel 236 in Caldwell or should Bryan be allowed to take channel 236 from Caldwell for its own proposed further upgrade in College Station. At this point in time the case remains awaiting FCC action on a pending Petition for Reconsideration and under the overall jurisdiction of the U. S. Court of Appeals where the case will undoubtedly be finally determined.

Given the long history of this proceeding and the prospect that a final decision ending the case one way or the other may be reasonably expected within the next ten to twelve months, we submit that it would be in everyone's interest for the Commission to stay any further processing of any applications by Henderson or Bryan until this case is resolved by a final decision no longer subject to appeal. This point is all the more important since Henderson has already objected on the record to the Commission's consideration of post-remand applications filed by Bryan and intends to continue that objection on appeal.

Henderson is not unmindful of the Commission's record since deletion of the automatic stay provisions of rule 1.420(f) and

that it has since routinely acted upon and granted applications notwithstanding petitions outstanding in the rulemaking proceedings see e.g. Cloverdale, Montgomery and Warrior, AL, 12 FCC Rcd 2090, 2093 (1997). Nonetheless, the case before the Commission here is not the normal case. It has been vigorously disputed since 1989 and is now at last very close to final resolution. It would be contrary to the rights of the parties and the public to allow the further processing of pending applications which could effect the final status of the parties as they will finally appear before the court. Specifically, Henderson submits that application of the test for adoption of a stay order is met and that a stay in these circumstances would be appropriate. As set forth in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) and Virginia Petroleum Jobbers Association v. FPC, 295 F.2d 921 (D.C. Cir. 1958) the test includes the following four elements:

1. A likelihood to prevail on the merits
2. A showing of irreparable injury
3. Other parties to the proceeding will not be substantially harmed by issuance of the stay, and
4. The public interest would be best served by the stay

Given the fact that in the history of this case, the Commission has never ruled in Henderson's favor on any point, that does not change the basic argument of who best meets rule 73.315(a), and whose proposal would render the best service in terms of area and population and under those considerations, Henderson clearly has the best case and should ultimately prevail.

Irreparable injury would be suffered by Henderson if he is blocked from use of his new site on channel 236 as he has requested in his pending application since it is a unique site best serving Caldwell in full compliance with all rules. Conversely, Bryan to this point has made no effort to build anything and has spent the past months merely going from site to site trying to improve its case. It would not be harmed by simply holding processing of its several applications in abeyance until such time as a final ruling is rendered in this case. Clearly, the public interest would best be served by maintaining the existing status quo of the parties as they are presented on appeal to the Court. We do not believe it to be in the interest of the public, or the parties, or the commission itself to allow disputed changes in the substantive cases to take place over objection and to then present a tainted record to the Court for review.

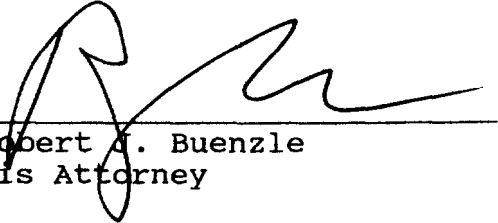
VI. Conclusion

In the circumstances of this case, as it proceeds to a final decision, it would be in the best interests of all concerned to hold in abeyance any further processing of pending applications by the respective parties and to stay such further processing until a final decision, not subject to further appeal is rendered in this case.

Wherefore, Henderson respectfully requests that the requested Stay be granted.

Respectfully Submitted,

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July 6, 2000

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Motion For Stay have been served by United States mail, postage prepaid this 6th day of July, 2000, upon the following:

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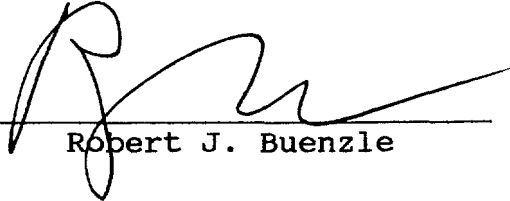
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